No. 210

In the Supreme Court of the United States

OCTOBER TERM, 1942

RAPID ROLLER CO., A CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

INDEX

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 2035–2050) is reported in 126 F. (2d) 452. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 216–274) are reported in 33 N. L. R. B., No. 108.

JURISDICTION

The decree of the court below (R. 2070–2073) was entered on May 8, 1942. A petition for rehearing (R. 2051) was denied on April 9, 1942 (R. 2052). The petition for a writ of certiorari was filed on July 6, 1942. Jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting the finding of the Board, which was sustained by the court below, that petitioner refused to bargain collectively in violation of Section 8 (1) and (5) of the National Labor Relations Act.

2. Whether members of a union who strike as a result of an employer's unfair labor practices lose their employee status within the meaning of Section 2 (3) of the Act solely because of the expiration during the strike of a collective labor agreement between the employer and the union.

3. Whether an employer has the right to reject an application for reinstatement made by a union on behalf of its members who have struck as a result of the employer's unfair labor practices solely because it requires the reinstatement of all of the strikers and discharge of those hired during the strike to replace them.

4. Whether, under the circumstances of this case, the court below, in remanding to the Board the back pay portion of the Board's order for presentation by petitioner of evidence of unjustifiable refusal by discharged and striking employees to take desirable new employment, imposed an unlawful burden upon petitioner.

The following question is urged by petitioner, but is not, we think, properly presented.

5. Whether, under the circumstances of this case, the court below, in remanding to the Board the back pay portion of the Board's order for presentation by petitioner of evidence of unjustifiable refusal by discharged and striking employees to take desirable new employment, infringed the discretionary authority of the Board.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act of July 5, 1935, c. 372, 49 Stat. 449 (U. S. C., title 29, secs. 151 *et seq.*) are set forth in the Appendix, *infra,* pp. 23–25.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 216–274). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

Shortly after Local No. 120, United Rubber Workers of America (hereinafter referred to as the Union) began to organize petitioner's employees in the spring of 1937 (R. 219–220; R. 228–289), petitioner sought to prevent it from gaining a foothold in its plant. Petitioner's president,

[1] In the following statement the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

Rapport, in the latter part of March 1937 and the early part of April 1937, held mass meetings of the employees at the plant on company time, at which he attacked the collective activities in the plant, threatened to move the plant to another community if the men joined a union, disparaged the effectiveness of unions and the character and motives of their leaders, and charged that "there is a movement afoot to bring in outsiders here and cause me trouble" (R. 220–221; R. 293–295, 434–435, 511–514, 564, 566, 609–610, 633–635, 687–689, 1016–1064, 1162–1164). At the first meeting which he held Rapport also closely questioned several employees, organizers of the Union, before the entire assemblage. At the second meeting Rapport suggested that the employees form a "little inside organization" and offered to make substantial financial contributions to it (R. 221, 223–224; R. 297–299, 438–439, 566–567, 608, 634–635; R. 931–932, 989–1002, 1060–1061, 1064).

Soon after the first meeting Rapport warned a group of employees: "I will get even with these fellows who don't play ball with me. It may take me one year or it may take me five, but I will get even" (R. 221–222; R. 436–437, 296). At about that time petitioner granted to all the production and maintenance employees a $2-a-week increase "to keep them from joining the union" (R. 122, 126; R. 1438–1439, 296, 391, 431, 437, 513, 551–552, 569, 574, 635, 690–691, 936, 946, 996–997, 1002, 1062),

and shortly thereafter offered substantial wage increases and long-term employment contracts to three of the leaders in the organizational drive on condition they "stay out of the union" (R. 222–223; R. 513–514, 296–297, 689).

As the employees left the plant after the second mass meeting, Rapport sought to dissuade the men from attending a union meeting and to prevent them from receiving organizational leaflets which were being distributed outside the plant (R. 224; R. 300, 426–430, 438–441, 514–515, 588, 1448). Referring to the organizers and the Union as "racketeers" he again stated that he would "close down" and move the plant before he would permit the Union to "get in" (R. 224–225; R. 1443–1450, 300–301, 439–441, 515, 582, 939–940, 1167–1168, 1207, 1455, 1458–1461). Other officials of petitioner also participated in related efforts to defeat the Union (R. 225, 227; R. 560, 570, 584–585, 623, 695–696, 791–793, 799–800, 819–820, 1125, 1129, 1180, 1211–1212).

On April 23, 1937, petitioner entered into a collective bargaining contract with the Union (R. 226; R. 100). During the period when this agreement was negotiated and in force, petitioner manifested a continuing hostility to the Union and a determination to unseat it when an opportune occasion should be presented. In April 1937, during the conferences between petitioner and the Union (R. 226; 100–101), Rapport stated that he "wouldn't recognize the union under any circumstances * * *

if it weren't for the fact that he had a lot of orders waiting to be shipped out", that the Union "had him by the neck, and if he ever had the opportunity he would get even * * *" (R. 226; R. 1435), that the employees who constituted the Union's bargaining committee were "rats, disloyal rats", and that he would "get even with" and in time "get rid of" them (R. 226; R. 1436–1438, 1440, 1685).

Shortly after the execution of the contract, Rapport openly interfered in the internal affairs of the Union, demanding that it "remove" employee Moore from its Shop Committee because Moore was a Negro (R. 226–227; R. 303–304, 516). In June 1937 Rapport berated Moore for having organized the Union, warned Moore that he would regret his union activity, deprecated the Union's motives in selecting him as a shop steward and sought to induce him to act as a labor spy (R. 227; R. 448, 951). In April 1938 Rapport threatened Moore with a crank handle when the latter sought to present a grievance, and said to him: "You bastard, you no good son-of-a-bitch, I will bust your head open. You have no right to be telling me how to run my factory * * * you no good son-of-a-bitch, you have no right to be a shop steward, you are a janitor, that is all you are, that is all you ever will be. You went to college and came here and you fill these guys' heads full of union ideas and organizing the union. I will get rid of you and the union" (R. 231; R. 444–446, 1012-1013, 1068, 1476–1477,

1493–1494). The Board found that by the above-described conduct petitioner interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 228, 233).[2]

In April 1938, prior to the expiration of the 1937 agreement, petitioner transferred employee Meskan to its blanket department (R. 239; R. 592, 1178–1179, 441–442, 1004–1005). When Union Shop Committeeman Moore urged that persons with greater seniority ought to have been preferred to Meskan (R. 230–231; R. 442-443, 1179), President Rapport denounced Moore and the Union in the manner described above (*supra,* page 6). After insulting Moore further, Rapport announced his discharge, although Moore protested that all he had done was to present a union grievance (R. 232; R. 444–446, 448, 1013, 1495). Settlement of the dispute was reached only after petitioner's employees had stopped work in protest against its conduct (R. 232–233; R. 446–447, 948–951, 1012–1016, 1066–1069, 1495–1496).

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[2] These findings are summarized here because they demonstrate petitioner's continuing hostility to the Union. As the court below pointed out (R. 2040): "The making of the contract did not purge the Company of its acts of interference * * * which * * * continued after the contract had been entered into." The threats of reprisal against the Union illuminate petitioner's subsequent stand in the controversy about which the case turns. Cf. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 586.

The 1937 agreement expired a few days later. During negotiations for a new agreement, the Union sought a closed shop, but accepted clause 1[3] of the agreement upon assurance by petitioner that this was a "substitute clause for the closed shop" (R. 239; R. 305–306, 451–452, 517–518, 536–537, 636–638, 851–854, 869–874, 882–883, 1024–1029, 1326–1327, 1332–1335, 1339–1341), amplified by Rapport's further assurance that he would not hire even his "own brother" if the Union objected (R. 239; R. 306–307, 451–452, 518, 536, 638, 952–953). The 1938 agreement also contained, in clause 10, the provision that: "Promotions shall be made in accordance to seniority so far as practicable, consistent with efficient operation" (R. 94).

In September 1938, despite the existence of clause 10 in the contract, Rapport, without previous con-

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[3] Clause 1 is as follows (R. 92): "The Employer agrees that its factory employees may join the Union and shall have the right to elect such representatives as they shall deem necessary to carry out the purposes of this agreement. The Employer agrees that it will not discriminate against any employee by virtue of his or her union affiliation or activity, or because of age, race, or nationality, or for the purpose of evading the spirit and letter of this agreement. The Employer further agrees to deal with the said Union and with its representatives as above stated in creating a satisfactory industrial relationship between the employer and its factory employees, in effectuating the provisions contained in this agreement. Employees further agree that they will cooperate with the Employer to promote the general welfare of the Employer and Employees, and to insure the perpetuation of amicable relationship between the parties thereto. All applicants for employment shall be referred to the shop committee before going to work."

sultation with the Union transferred employee Levy from the laboratory to the blanket department (R. 233–234; R. 311–312, 453, 519, 823–824, 955–956, 1180–1182). The Union protested vigorously, contending that this transfer constituted a violation of the contract (R. 235; R. 312–313, 393–394, 454–456, 518–520, 537–538, 641–644, 773–774, 955–960, 1132–1135, 1182–1184). Rapport, admitting the violation, requested the Union to allow the transfer as "a special favor this time * * *," promising, "I won't ask you to do it again" (R. 235; R. 455, 389, 312–313, 400–401, 644–645, 958–959). The Union refused to sanction this admitted breach of the contract, and when Rapport declined to remove Levy (R. 231; R. 645), petitioner's employees were forced once again to resort to a partial strike, ceasing work for 2 hours on September 9, 1938 (R. 236; R. 645). Rapport thereupon transferred Levy to his former job (R. 236; R. 456–458, 956–963, 1184–1186).[4]

[4] While the Meskan and Levy incidents were not made the basis of a Board finding that petitioner violated the act, the incidents form part of the "totality of the Company's activities during the period in question" (*National Labor Relations Board* v. *Virginia Electric & Power Company*, 314 U. S. 469, 477), and foreshadowed petitioner's ultimate determination to remove the matter of staffing the blanket department from the scope of bargaining negotiations. As the court below stated (R. 2042): "We have cited the instances of Meskan and Levy not as instances of refusal to bargain but to show the arbitrary attitude of the company in its dealings with the Union."

Ostensibly in deference to the Union's demands respecting the blanket department, in October 1938 petitioner submitted to the Union a proposed "System of Inter-Departmental Transfer to the Blanket Department" (R. 240; 459, 490–491, 1806–1807). The proposal expressly barred the Union's grievance committee from handling employee grievances arising in connection with the transfers (R. 240–241; R. 459, 490–491, 1807–1808).[5] The Union accepted most of the points embodied in this plan and submitted a few counterproposals; in response to petitioner's rejection of grievance machinery in the event of disputes between the foremen and the transferred employees, the Union conceded that "All transfers naturally will have to be approved by the foremen", but requested that the normal grievance machinery[6] be retained (R. 241–242; R. 1808). Petitioner failed to act upon the Union's suggested modifications of the plan and the entire

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[5] Section 8 of petitioner's proposal provided (R. 241; R. 1808): "All transfers are subject to the approval of the floor superintendent * * * The superintendent is the sole judge and his decision is final, and it does not come under the jurisdiction of the grievance committee."

[6] Clause 3 of the 1938 agreement provided (R. 92): "There shall be appointed in each of the various departments (rubber, blanket, composition, maintenance, and any and all additional departments that may be established) a Union representative who shall represent the employees in this department, and who shall in their behalf take up all grievances which may arise in such department with the department foreman and they shall cooperate and attempt to adjust such grievances amicably."

project lapsed thereafter (R. 241–242, 246; R. 315–317, 459–460, 523).

In January 1939 all the superintendents of petitioner's departments conferred with the Union respecting a list of future transferees to the blanket department (R. 242; R. 1809, 771, 1159, 541–542, 522–527, 648–650, 771–773, 965, 971, 1074–1082, 1101–1124). The Union submitted 12 names, in order of seniority (R. 242; R. 1809, 802). Although the superintendent of the blanket department conceded that he "could make spreaders"[7] of all those persons, except one, and all the superintendents agreed that at least two persons were qualified to work in the blanket department (R. 242; R. 1557, 1085–1087, 1105–1106, 1240), they nevertheless rejected the Union's list, without submitting an alternative proposal (R. 246; R. 1557). Again, no further negotiations were held and no agreement was reached (R. 242; R. 1557, 1124, 1038–1039, 1086–1087).

Later that month, Rapport, still without offering a substitute proposal, expressed contempt for the Union's list, berated the Union, threatened to move the factory out of town, and warned that "the next time I have trouble in the blanket department, it is going to be a different story" (R. 243–246; R. 461–463, 384, 982–983).

Despite the provision in clause 1 of the 1938 agreement (a "substitute clause" for the closed

[7] Employees of the blanket department.

shop, *supra,* p. 8) that "all applicants for employment shall be referred to [the Union's] Shop Committee before going to work" (R. 238; R. 92), during the last week of February 1939 petitioner hired four new employees and put them to work on March 2 in the blanket department, without having previously referred them to the Union's Shop Committee (R. 237; R. 1215, 839, 842–3, 1083, 1094–6, 1142, 1187–1199, 1150–1155, 1552, 1559, 1581, 888–891, 1586). Upon learning that these new employees had been hired, the Union's Shop Committee immediately protested that this hiring constituted a violation of clauses 1 and 10 of the 1938 contract (R. 237–238, 246–247; R. 467, 319–324, 651–3, 476, 498, 683, 889–891, 971–973, 1199–1201, 1418–1420, 1557–1559, 1567).

Plant Manager Schwartz replied that "management has seen fit to place these men, management has seen fit to keep them there" (R. 247; R. 467, 320, 653, 1200, 1207). President Rapport insisted that there was nothing to discuss, that there would be "no negotiations on interpretation of the contract," that "it [the hiring of the new men] was a problem of management", that whether the Union liked it or not the new employees would remain in the blanket department. Referring to the prior disputes with the Union he stated: "I did not accept anything; you forced me to. You know I had to sign all those contracts and I had to accept your contentions then because I wasn't prepared and

you was. This time it will be a different story" R. 247; R. 322, 332, 651–653, 970–972, 982, 1042–1043, 1200–1201, 1207).

In direct response to the hiring of the four men and Rapport's refusal to "discuss the matter further with our Shop Committee", the Union on that day petitioned its parent international for strike authorization, and on the following day, March 3, 1939, its members voted to strike (R. 248; R. 407, 470–474, 887, 1039–1042, 1543, 1557–1559, 1571–1580, 1773–1775, 1783, 1789, 1889–1897).

At a meeting on March 6, 1939, the Union's contention that petitioner had violated clauses 1 and 10 of the contract was rebuffed by petitioner's insistence that interpretation of the contract constituted a "matter of opinion" and that the "hiring of the four men" was a "question of management" concerning which the Union "had no right to negotiate" (R. 248–249; R. 474, 494, 324, 328, 655, 973). Petitioner asserted that, "We would like to manage the affairs * * * of the company" (R. 249; R. 1048–1049), and rejected a compromise offer advanced by the Union (R. 249; R. 325–328, 475–477, 495).

On March 10, 1939, when the Union announced to Rapport that it had received a strike authorization and requested him to reconsider, he reaffirmed petitioner's stand that this "question of management" could not be negotiated and that there would not be "any interpretation as far as the contract

was concerned" (R. 250; R. 330–332, 475–478, 1045–1047, 1052). Petitioner then rejected the Union's offer to withdraw from its prior position against the transfer of Levy to the blanket department (whom Rapport had previously sought to transfer to the blanket department) (R. 250–251; R. 334–334, 477–478, 658–659, 1213, *supra*, pp. 8–9). The Union instituted a strike that afternoon (R. 251; R. 478–479, 659).

On March 13, 1939, during the strike, petitioner began to hire new employees to take the place of the strikers (R. 251; R. 1224). On the same day, when the Union again insisted that petitioner had violated the contract, petitioner restated its refusal to "negotiate the matter", adding, "* * * we told these boys before they went out on strike and we tell them now that it is a strict prerogative of management, the placing and the hiring of men" (R. 251; R. 479–481, 335–336, 531, 898–899). Petitioner then refused to submit the issue to arbitration, as requested by the Union, on the ground that the matter at issue was one of "interpretation" and not "a matter for arbitration, which requires give and take" (R. 252; R. 901–902, 336, 531, 779).

On May 9, 1939, Local No. 120 unconditionally offered the return to work of all the strikers. Petitioner rejected the offer, indicating its willingness, however, to employ a small number of strikers, adding that it would not discharge any competent employees hired to replace the strikers (R. 252;

R. 1017–1022, 717–726, 746, 763–764, 756–757, 780–782, 984, 1399–1401, 1410).

Upon its review of the facts the Board found that petitioner had, in its dealings with the Union with respect to the hiring of the four men, maintained a "rigid predetermination" not to consider the Union's contentions (R. 255–256). The Board further found that respondent's lack of good faith in dealing with the Union and its leaders was reflected in its long-standing antipathy to the Union which had not abated in 1939 and in its treatment of the problem of transfers to the blanket department in October 1938 and January 1939 which, the Board found, constituted further evidence of petitioner's "ultimate unwillingness to deal with the blanket department except on its own terms" (R. 256). Accordingly, the Board found that petitioner had refused to bargain collectively in violation of Section 8 (1) and (5) of the Act (R. 257). The Board further found that petitioner's unfair labor practices had caused the strike of March 10, 1939, and that the strike was prolonged because petitioner continued to engage in these unfair labor practices and that petitioner's refusal to reinstate all of the strikers upon application by the Union on May 9, 1939, constituted a violation of Section 8 (1) and (3) of the Act (R. 260).

The Board's order required petitioner to cease and desist from its unfair labor practices; to bargain collectively upon request with the Union; to

offer reinstatement or placement upon a preferential remployment list to all of the strikers, except one, with back pay to all; and to post appropriate notices (R. 270–273).

On July 21, 1941, petitioner filed in the court below a petition to review and set aside the Board's order (R. 1–10). The Board answered, asking enforcement of its order (R. 28–32). On February 2, 1942, the court handed down its opinion (R. 2035–2050) and on May 8, 1942, entered its decree (R. 2070–2073) enforcing the Board's order and remanding to the Board that portion of the order referring to the matter of back pay for presentation to the Board by petitioner, within thirty days after the entry of the decree, of evidence of unjustifiable refusal by the strikers to take desirable new employment.[8] The court further ordered that upon

[8] Although the court below expressly noted (R. 2049–2050) that petitioner had failed to raise before the Board the issue of unjustifiable refusal by the discharged employees and the strikers to take desirable new employment, it nevertheless rejected the Board's contention that the question was raised too late and that a remand was improper. We believe that the court erred in ordering the remand. We also believe that the court erroneously rejected the Board's contention (R. 2063) that the scope of inquiry on remand be limited to the period between the date of the unfair labor practices and the date of the initial hearing. While we do not think that these errors are, under the circumstances of this case, of sufficient moment to warrant a petition for certiorari on behalf of the Board, we nevertheless reserve the liberty to raise the issue of tardiness of objection in defense of the decree below in the event that a writ of certiorari is granted to petitioner.

the failure of petitioner to present to the Board evidence of such unjustifiable refusal to take desirable new employment within the above-described time, the portions of the order dealing with back pay be forthwith enforced as written.

ARGUMENT

1. Petitioner's contention (Pet. 21–36) that the Board's finding that petitioner refused to bargain collectively is not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra,* pp. 3–15) affords abundant support for the challenged finding. That the court below did not, as petitioner contends (Pet. 2), apply an improper standard in considering whether there was support in the evidence for the Board's findings, is apparent on the face of the court's opinion. The court stated (R. 2036):

> The main question in this case, around which all others revolve, is whether or not there is substantial evidence to support the Board's order. It is axiomatic that upon such a question we do not try the case or weigh the evidence or pass upon the credibility of the witnesses in discharging our duty in these circumstances, we look only to the evidence that is favorable to the Board.

The standard of review adopted by the court was clearly proper. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 229;

National Labor Relations Board v. *Nevada Consolidated Copper Corp.*, No. 774, October Term, 1941, decided April 27, 1942.

Moreover, there is no conflict, as petitioner suggests (Pet. 32), with other cases decided by this Court. Petitioner's contention (Pet. 31–32) that, to allow the Board's finding to stand would be to compel the employer to make an agreement, and that the decision below enforcing the Board's findings is therefore in conflict with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, has no merit. The Board did not compel any agreement; it properly insisted that petitioner negotiate in good faith in an attempt to reach an accord concerning working conditions in the blanket department, a subject clearly within the proper scope of collective bargaining. Petitioner's refusal to bargain as to the true meaning of the existing contract (R. 256–257), as to which the Union had raised a substantial question, was based upon petitioner's arbitrary stand that employment in the blanket department was solely the concern of management.[9]

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[9] Petitioner also cites (Pet. 32) *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515, 549, and *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342. Both of these cases support the decision below; the former affirms the validity of the requirement that bargaining be in good faith under the analogous Railway Labor Act, while the latter holds that in addition to the requirement that employers bargain collectively with their employees to the end that

2. Petitioner contends (Pet. 16–21) that the collective labor agreement between petitioner and the Union constituted a contract of employment and that upon its expiration during the strike, the strikers lost their status as employees under Section 2 (3) of the Act. While we do not concede that the agreement of 1938 between petitioner and the Union created, or was intended to create, an employment relationship, it is clear that the employee status preserved under Section 2 (3) to those "whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice" is in no sense dependent upon whether the interrupted employment relationship is for a term or at will. Cf. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 219. Since no claim is, or can be, made that the employment status lapsed as a result of an effective discharge "for repudiation by the employe of his agreement" (*National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 344) or for tortious conduct during the strike (*National Labor Relations*

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binding contracts be made, "the Act imposes upon the employer the further obligation to meet and bargain with his employes' representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation, if there is any doubt as to its meaning." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, to which petitioner also refers is not in point.

Board v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 254), the employee status of the strikers clearly remained intact. *National Labor Relations Board* v. *Mackay Radio & Telegraph Company*, 304 U. S. 333, 347; Sections 2 (3) and 13 of the Act.

3. Petitioner's contention (Pet. 38–40) that the strikers' application for reinstatement failed to place petitioner in default because it required that petitioner reemploy all of the strikers is without merit. Under well-established and uniform authority the strikers were entitled to demand their reinstatements as a group, even if that necessitated the discharge of all those hired after petitioner's unfair labor practices. *Black Diamond S. S. Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875, 879 (C. C. A. 2), certiorari denied, 304 U. S. 576; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 871 (C. C. A. 2), certiorari denied, 304 U. S. 576; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 175 (C. C. A. 3), certiorari denied, 308 U. S. 605; *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 437, (C. C. A. 7).

4. Equally without merit is petitioner's contention (Pet. 36–38) that the court below imposed an unlawful burden upon petitioner and infringed the discretionary authority of the Board by remanding the case to the Board for the presentation of evidence by petitioner concerning unjustifiable refusal

by the employees to take desirable new employment.

The remand of this issue was grounded upon the principle that the burden of presenting evidence is upon the employer (R. 2073). This was clearly proper. This Court has held in *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 198–202, that while the Board should order deductions from back pay on account of "clearly unjustifiable refusal to take desirable new employment" (313 U. S. at 199–200), this was in no sense a part of the Board's case but simply that "the employer should be allowed to go to proof on this issue" (*id.,* at 200).

Far from invading the discretion of the Board, the court below acquiesced in the Board's suggested procedure (R. 2063) and merely recognized the Board's "wide discretion to keep the present matter within reasonable grounds through flexible procedural devices" (*id.,* at 199). In any event, it is not open to petitioner to complain (Pet. 36–38) that the discretionary authority of the Board has been infringed. *Virginian Ry.* v. *System Federation No. 40,* 300 U. S. 515, 558. See also *Erie R. R. Co.* v. *Williams,* 233 U. S. 685, 697; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576.

CONCLUSION

The decision of the Circuit Court of Appeals enforcing the Board's order is correct. No conflict or other reason for further review of the order is presented. It is therefore respectfully submitted

that the petition for a writ of certiorari should be denied.

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JULY, 1942.